83-1942

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NEIL SIMMONS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

C. James McCallar, Jr.
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102 pp

QUESTIONS PRESENTED

1. Whether it violated due process as required by the Fifth Amendment of the United States Constitution to indict and convict the petitioner of conspiring to possess with intent to distribute in excess of one thousand (1,000) pounds of marijuana in violation of the substantive offense set forth under 21 U.S.C. §841(a)(1), (b)(6) without requiring proof of knowledge of marijuana in excess of 1,000 pounds?

2. Whether it violated due process and the right to a fair jury trial as required by the Fifth and Sixth Amendments of the United States Constitution for the Eleventh Circuit Court of Appeals to uphold the trial court's refusal to give a specific jury charge on a theory of defense founded on the

law, supported by the evidence, drawn to the court's attention and requested by the defendant?

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IN THE
SUPREME COURT OF THE UNITED STATES
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NEIL SIMMONS,
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UNITED STATES OF AMERICA,
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ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The published opinion of the Court of Appeals for the Eleventh Circuit is reported as United States v. Simmons, 725 F. 2d 641 (11th Cir. 1984).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on

February 24, 1984. United States v. Simmons, 725 F. 2d 641 (11th Cir. 1984). (Appendix at 2a). A timely petition for rehearing en banc filed by the Petitioner was denied on March 28, 1984. (Appendix at 18a). This petition for a writ of certiorari has been filed within the allowable sixty days of the judgment of the Court of Appeals for the Eleventh Circuit denying rehearing. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

LIST OF PARTIES

Nelson Valladares and Leroy Williams were also parties to this case below. Petitioner Simmons believes these parties have no interest in the outcome of this petition, but is serving them with copies.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

21 U.S.C. §841(a)(1):

"(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. §841(b)(6):

"(6) In the case of a violation of subsection (a) involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000.' (See Appendix at 21a for complete statute.)

STATEMENT OF THE CASE

On September 16, 1982, Petitioner Simmons, was indicted along with other co-defendants in the United States District Court for the Southern District of Georgia and charged in two counts of a three-count indictment (Appendix at 39a) with possession with intent to

distribute a quantity of marijuana in excess of 1,000 pounds in violation of 21 U.S.C. §841 (a)(1), (b)(6) and 18 U.S.C. §2 (Count Two) and with conspiracy to possess with an intent to distribute in excess of 1,000 pounds of marijuana in violation of 21 U.S.C. §841 (a)(1), (b)(6) and 21 U.S.C. §846 (Count Three). (R. Vol. 1, p. 1-7, 13). Mr. Simmons entered a plea of not guilty to the charges on September 24, 1982. (R. Vol. 1, p. 13).

The case came on for trial by jury on November 29, 1982 with the Honorable Gerald B. Tjoflat, United States Circuit Judge for the Eleventh Circuit Court of Appeals, sitting by designation, presiding. (R. Vol. 12, p. 1). On December 2, 1982, after the close of the government's case, the Court entered a directed verdict of acquittal of Mr.

Simmons on Count Two of the indictment (the substantive offense). The trial court held that knowledge of marijuana in excess of 1,000 pounds was essential to a conviction for the substantive offense charged and that there was insufficient evidence to prove that Petitioner Simmons had knowledge of an amount of marijuana in excess of 1,000 pounds. The court allowed the conspiracy count on the same substantive charge to go to the jury. (R. Vol. 18, pp. 613-616, 636). On December 3, 1982, a jury verdict was rendered finding Mr. Simmons guilty of Count Three of the indictment (the conspiracy count). (R. Vol. 20, p. 1102; Vol. 7, p. 3491). The verdict was made the Judgment of the District Court on January 4, 1983, and Mr. Simmons was sentenced to imprisonment for a period of 5 years under 18

U.S.C. §4205 (b)(2) and fined the sum of $25,000.00. (R. Vol. 8, p. 3633).

The Court of Appeals for the Eleventh Circuit affirmed the conviction for conspiracy to commit the substantive offense holding to the converse of the trial court that knowledge of marijuana in excess of 1,000 pounds was not an essential element of the substantive offense and that proof of such knowledge was not necessary. The Court of Appeals declined to comment upon the issue of the refusal of the trial court to charge Petitioner's theory of defense. (Appendix at 33a).

The evidence at trial showed that Petitioner Simmons, was 54 years old, had been in the trucking business in Savannah, Georgia, for over 30 years and owned a truck repair business. (R. Vol. 18, p. 668-670). As an adjunct to his

truck repair business, he frequently assisted customers in procuring trucks suited to their needs. (R. Vol. 18, p. 694; Vol. 16, pp. 271, 277-278, 280). James Ingram, Sr. an incarcerated, previously convicted co-conspirator (R. Vol. 15, pp. 96-99) was the only witness who testified that Mr. Simmons either participated in the conspiracy or had any knowledge of marijuana involved in the conspiracy. (R. Vol. 15, pp. 121-127, 191-193, 198-200). Ingram testified that he talked to Simmons about using his facility to store a truck with marijuana and that Mr. Simmons sold or negotiated the sale of a truck to him. (R. Vol. 15, p. 121, 123, 124, 125-127, 191, 199).

There was testimony that Mr. Simmons knew something of the illegal purpose to which the buyer meant to use the truck.

(R. Vol. 15, pp. 126-177). There was testimony that Mr. Simmons did not become a knowing participant in the conspiracy. (R. Vol. 18, p. 668-676). There was no evidence that Petitioner Simmons ever discussed with anyone the amount or quantity of marijuana involved in the conspiracy nor that he was aware of a quantity of marijuana in excess of 1,000 pounds. Simmons at best knew the size of the truck. (R. Vol. 15, pp. 120, 126, 283, 673). There is no evidence that Simmons was involved at all in the actual importation of mari- juana, in the off-loading operation, the physical loading, handling or storage of any marijuana. The undisputed testimony was that Simmons had never seen any marijuana in his life. (R. Vol 18, p. 668).

The attention of the trial court was precisely drawn to a theory of the

Simmons defense that one may furnish a vehicle to a buyer knowing that the buyer plans to use it for a criminal purpose without becoming a participant or co-conspirator in the criminal plan. Simmons submitted a written Request to Charge on this theory which was denied. (R. Vol. 7, p. 3474). (Appendix at 33a). Additionally, the court's attention was drawn to this theory of defense on motions before closing arguments (R. Vol. 19, pp. 916-917) and again upon exception to the charge of the court. (R. Vol. 20, pp. 1093-1094).

The Court was clearly aware of the theory presented by Simmons (R. Vol. 19, pp. 916-917) and refused upon request to give a specific charge on the theory. (R. Vol. 20, pp. 1093-1094).[1]

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1. A copy of all jury charges of the

REASONS FOR GRANTING THE WRIT

I. DUE PROCESS AS REQUIRED BY THE FIFTH AMENDMENT WAS DENIED PETITIONER WHEN THE ELEVENTH CIRCUIT COURT OF APPEALS IMPROPERLY UPHELD AN INDICTMENT AND CONVICTION OF PETITIONER FOR CONSPIRING TO POSSESS WITH INTENT TO DISTRIBUTE IN EXCESS OF 1,000 POUNDS OF MARIJUANA IN VIOLATION OF THE SUBSTANTIVE OFFENSE UNDER 21 U.S.C. §841(a)(1), (b)(6) WITHOUT REQUIRING PROOF OF KNOWLEDGE OF MARIJUANA IN EXCESS OF 1,000 POUNDS.

The opinion of the Eleventh Circuit Court of Appeals dated February 24, 1984 has interpreted 21 U.S.C. §841 (a)(1), (b)(6) in a manner that offends due process as required by the Fifth

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trial court has been transmitted by letter to the Clerk for reference.

Amendment of the United States Constitution. (Appendix at 2a, 21a). Petitioner Simmons was convicted at trial on Count Three of an indictment specifically charging him with conspiracy to possess with intent to distribute in excess of 1,000 pounds of marijuana in violation of 21 U.S.C. §841(a)(1), (b)(6) and 21 U.S.C. §846. (Appendix at 39a). The Eleventh Circuit Court of Appeals erroneously held it was not necessary for the Government to prove that Petitioner Simmons had knowledge of marijuana in excess of 1000 pounds in order to secure a conviction under Count Three charging the conspiracy to commit the substantive offense.

The language of 21 U.S.C. §841(a)(1), (b)(6) clearly provides for an offense involving an element of proof of

marijuana in excess of 1,000 pounds and provides for a more severe punishment to be imposed for that offense. Sections (b)(1) through (b)(5) of §841 set forth particular sentences to be applied to convictions under (a)(1) of §841. However, when Congress added section (b)(6) to §841 it created not only an additional penalty provision but also created a new offense (possession of marijuana in excess of 1,000 pounds) with respect to that penalty. It is obvious that a new offense was created by (b)(6) because a penalty already existed in the statute for possession of marijuana without regard to amount in section (b)(1)(B).

By specifically charging Petitioner Simmons with conspiracy to commit this offense the Government elected to seek a conviction of Simmons involving the more

severe substantive offense set forth in this statute, to-wit: possession with intent to distribute more than 1,000 pounds of marijuana. Knowledge of marijuana in excess of 1,000 pounds is essential to a conviction under 21 U.S.C. §841(a)(1), (b)(6).

To require less violates the requirement embodied in the due process clause of the Fifth Amendment that every essential element of a penal statute be proved beyond a reasonable doubt. Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S. Ct. 624 (1960). Also, in this case even if it could be contended that knowledge of marijuana in excess of 1,000 pounds was not an essential element of the offense charged, the indictment itself charges Simmons in language that requires proof of knowledge of marijuana in excess of

1,000 pounds before the charging elements of the indictment are proved. Every charging element in the indictment must be proved as laid in order to comply with established due process Fifth Amendment rights. The petitioner had a right to be tried solely on the charges made in the indictment returned by the Grand Jury. United States v. Stironi, 361 U.S. 212, 217, 4 L.Ed.2d 252, 257, 80 S. Ct. 270, 273 (1960). By its interpretation of this statute and by its holding that knowledge of marijuana in excess of 1,000 pounds need not be proved as charged in the indictment, the Court of Appeals, in effect, sanctioned a variance in violation of this due process aspect of the Fifth Amendment.

Knowledge of marijuana in excess of 1,000 pounds is also essential to a

conviction on the charge of conspiracy to violate the substantive offense for, "[c]onspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself". Ingram v. United States, 360 U.S. 672, 3 L.Ed.2d 1503, 79 S. Ct. 1314,(1959); United States v. Malatesta, 590 F. 2d 1379 (5th Cir. 1979), cert. denied, 99 S. Ct. 1508 (1979).

The Court of Appeals opinion cites no case authority for its interpretation of the statute. It relies instead upon the legislative history demonstrating the purpose of Congress to enhance the punishment for offenses involving substantial amounts of marijuana. (Appendix at 35a); Report by Senate Labor & Human Resources Committee, Infant Formula Act of 1980, S. Rep. No.

96-916, 96th Cong. 2d Sess. Aug. 26, 1980, p. 14. The Court of Appeals then erroneously concludes that the requirement for more than 1,000 pounds of marijuana was relevant only after conviction to impose a more severe sentence and that knowledge of said amount of marijuana was not an essential element necessary to obtain the conviction. The legislative history does not support the Court of Appeals interpretation. The purpose of Congress to make offenses involving marijuana in excess of 1,000 pounds subject to a more severe penalty is not frustrated by requiring knowledge of a larger amount before imposing the more severe penalty. The language of the statute controls and it is apparent from a reading of the statutory language that before Simmons could be subjected to the more severe

penalty provisions of 21 U.S.C. §841 (a)(1), (b)(6), there must be proof beyond a reasonable doubt that he had knowledge of the involvement of marijuana in excess of 1,000 pounds.

> "The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem." Viereck v. United States, 318 U.S. 236, 243, 87 L.Ed. 734, 739, 63 S. Ct. 561 (1942).

The difficulty the Court of Appeals had with its interpretation of the statute is demonstrated by the following language of its opinion:

> "[2] We conclude, therefore, that the United States need not prove knowledge or intent of the accused to possess in excess of 1,000 pounds to be subject to the more severe sentence. To be subject to it, the government need only show that the amount knowingly possessed with intent to distribute exceeded 1,000 pounds." (Appendix at 2a).

This holding places the conviction

affirmed below at odds with the Supreme Court ruling in Ingram, supra, because knowledge of marijuana in excess of 1,000 pounds is an element of the substantive offense charged. Under Ingram, supra, proof of the elements of the underlying substantive offense is necessary in order to prove the conspiracy charge. It is readily apparent that the statutory requirement of knowing possession of marijuana in excess of 1,000 pounds is inconsistent with the proposition that the government need not prove knowledge or intent to possess marijuana in excess of 1,000 pounds.

Even if the statute is considered ambiguous, it is a recognized principle of construction that any ambiguity in the sentencing or substantive provisions of a penal statute should be resolved in

favor of lenity. United States v. Batchelder, 442 U.S. 114, 60 L.Ed. 2d 755, 99 S. Ct. 2198 (1979).

This is particularly true in the case before the Court where petitioner's involvement was alleged to be the sale of a free commerce truck to the criminal conspirators. Whether the circumstances in a particular case indicate that such a person became a knowing participant in the conspiracy is frequently a close question involving the outer limits to which a conspiracy prosecution can reach. See Direct Sales Company v. United States, 319 U.S. 703, 87 L.Ed. 1674, 63 S. Ct. 1265 (1942). There is a heightened necessity to provide every constitutional safeguard in a conspiracy prosecution whose sweep encompasses not only the main offenders, but also those whose connection to the conspiracy may

be tenuous.

The interpretation given to the statute by the Court of Appeals would allow application of the most severe penalty provision in cases involving marijuana in excess of 1,000 pounds to those who by their tenuous connection to the conspiracy have no knowledge of marijuana in excess of 1,000 pounds. This interpretation not only denies due process to those who lack knowledge of the more serious offense which triggers the more severe penalty, but it also expands an already powerful tool of prosecution by allowing the conspiracy prosecution to sweep within the more severe penalty provisions those who have no knowledge of the more serious offense.

The interpretation of the statute adopted by the Court of Appeals is likely to result in unequal enforcement

of the law -- a result which is contrary to the Anglo-American tradition of equality. It is significant that both the trial judge, the government and the defendants at trial agreed that knowledge of marijuana in excess of 1,000 pounds was an essential element of the statute as charged in the indictment. (R. Vol. 18, pp. 613-616, 636). In fact, the trial court entered a verdict of acquittal as to Simmons on the substantive charge under 21 U.S.C. §841 (a)(1), (b)(6), finding that there was insufficient evidence to prove that Simmons had knowledge of marijuana in excess of 1,000 pounds. (R. Vol. 18, p. 636, 613-616). The U.S. District Court for the Southern District of Florida in United States v. Shapiro, 531 F. Supp. 98 (1982), has also held that knowledge of marijuana in excess of 1,000 pounds

is an essential element of a charge under 21 U.S.C. §841 (a)(1), (b)(6). Those reading this statute and applying it in other jurisdictions are also likely to accept this plain meaning of the statute instead of the troublesome interpretation advanced by the government and adopted by the Eleventh Circuit Court of Appeals.

By recognizing that knowledge of marijuana in excess of 1,000 pounds is an essential element of 21 U.S.C. §841 (a)(1), (b)(6) the constitutional problems created by the Eleventh Circuit interpretation are avoided. Reading the statute to require proof of such knowledge as an essential element comports with the due process requirement of the Fifth Amendment. Such a reading is also consistent with the requirement of proof necessary to

prove the indictment in this case which charged possession with intent to distribute in excess of 1,000 pounds of marijuana. It is a cardinal principle of statutory construction that a statute should be construed to avoid constitutional questions where such an interpretation is fairly possible from the language of the statute. Crowell v. Benson, 285 U.S. 22, 62, 76 L.Ed. 598, 619, 52 S. Ct. 285 (1931).

II. DUE PROCESS AND THE RIGHT TO A FAIR JURY TRIAL AS REQUIRED BY THE FIFTH AND SIXTH AMENDMENTS WAS DENIED PETITIONER WHEN THE ELEVENTH CIRCUIT COURT OF APPEALS UPHELD THE TRIAL COURT REFUSAL TO GIVE A SPECIFIC JURY CHARGE ON A THEORY OF DEFENSE FOUNDED ON THE LAW, SUPPORTED BY THE EVIDENCE, DRAWN TO THE COURT'S ATTENTION AND REQUESTED BY PETITIONER.

The Eleventh Circuit Court of Appeals in its opinion dated Debruary 24, 1984 failed to address a significant issue raised by Petitioner Simmons in his appeal which would require a reversal of his judgment and conviction--the refusal of the trial court to charge a theory of defense founded in law and supported by the evidence. A criminal defendant has a right to a full statement of the law by the court to a jury and is entitled to the full benefit of his defense if it is founded in law. Spurr v. United States, 174 U.S. 728, 43 L. Ed. 1150, 19 S. Ct. 812 (1898); Bird v. United States, 180 U.S. 356, 45 L. Ed. 570, 21 S. Ct. 403 (1900). "[W]hen the evidence presents a theory of defense, and the Court's attention is particularly directed to it, it is reversible error for the Court to refuse to make any

charge on it." Calderon v. United States, 279 F. 556 (5th Cir. 1922); Perez v. United States, 297 F. 2d 12 (5th Cir. 1961); Strauss v. United States, 376 F. 2d 416 (5th Cir. 1967); Bursten v. United States, 395 F. 2d 976 (5th Cir. 1968); United States v. Partin, 493 F. 2d 750 (5th Cir. 1974); United States v. Taglione, 546 F. 2d 194 (5th Cir. 1977); United States v. Wolfson, 573 F. 2d 216 (5th Cir. 1978); United States v. Barham, 595 F. 2d 231 (5th Cir. 1979); United States v. Goss, 650 F. 2d 1336 (5th Cir. 1981).

Petitioner Simmons' theory of defense was that even though he may have sold or negotiated the sale of a truck knowing that it would be used for an illegal purpose, he did not intend to become a member of the conspiracy regardless of his knowledge. (R. Vol. 15, pp. 126-127;

R. Vol 18, p. 668). The genesis of this principle is found in the case of United States v. Falcone, 311 U.S. 205, 85 L. Ed. 128 (1940), aff'g 109 F. 2d 579 (2nd Cir. 1940). The Falcone principle has been recognized in the former Fifth Circuit and stands for a cardinal rule of conspiracy law that one does not become a co-conspirator simply by knowledge of the illegal purpose or by association with a conspirator. United States v. Grassi, 616 F. 2d 1295, 1301 (5th Cir. 1980); see also, Roberts v. United States, 416 F. 2d 1216 (5th Cir. 1969); United States v. Aguiar, 610 F. 2d 1296, 1303 (5th Cir. 1980).

The pervasive sweep of a conspiracy prosecution harbors inherent dangers to the fair administration of justice. Krulewitch v. United States, 336 U.S. 440, 445, 93 L. Ed. 790, 795 (1948)

(Jackson, J., concurring). These dangers are especially present where the prosecution focuses not upon the main offenders, but upon those claimed to be associated with them in some beneficial way to the conspiracy such as the seller or furnisher of goods to a member of the conspiracy. Falcone, supra.

The United States Supreme Court in Direct Sales Company v. United States, supra, also recognized the distinction drawn in Falcone (2nd Cir.), supra, between the seller's knowledge that the goods sold will be used in an illegal conspiracy and the further step of intentionally becoming a part of the conspiracy.

> "There may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken." Direct Sales, supra at 712.

Consistent with Direct Sales, supra,

a conviction for conspiracy requires proof of two elements, (1) knowledge of the conspiracy, and (2) deliberate, knowing and specific intent to join the conspiracy. United States v. Becker, 569 F. 2d 951, 961 (5th Cir. 1978). The Fifth Circuit has also recognized that under Direct Sales, supra, in addition to knowledge of the conspiracy, there must be intent to co-operate in it before one can be found guilty of joining. United States v. Michelena-Orovio, 702 F. 2d 496, 506, n.9, (5th Cir. 1983).

After infiltrating a marijuana smuggling operation and prosecuting and convicting the major participants in previous trials (R. Vol. 15, pp. 11, 96, 97; Vol. 16, pp. 248, 249; Vol. 17, p. 443) the government in the trial of Petitioner Simmons could produce only

one witness who testified that he participated in the conspiracy and there was no evidence that Petitioner Simmons had done anything but procure a truck.

Under these circumstances it was critical that the jury be given a clear and specific charge which would allow them to recognize and compare the defense theory to the facts before them. To allow less than this broadens an already pervasive tool of prosecution and "... sweep[s] within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders." United States v. Falcone, 109 F. 2d 579, (2nd Cir. 1940), aff'd 311 U.S. 205 (1940).

Consistent with the laws and the facts, the jury could have believed that Simmons sold a truck to a member of the conspiracy knowing that it would be used

to haul marijuana but that he was otherwise innocent of any participation in the conspiracy. A written request to charge based upon Falcone, supra was submitted on this theory. (R. Vol. 7, p. 3474). (Appendix at 33a). Despite a request by counsel (R. Vol. 20, pp. 1093-1094) the court did not give the requested charge or any other charge on this theory. (R. Vol. 20, p. 1094).

When the facts establish a theory which, if believed by the jury, would be a defense to the charge a specific instruction to the jury is required. Spurr, supra; Bird, supra; Strauss, supra; United States v. Lewis, 592 F. 2d 1282 (5th Cir. 1979). The theory of defense should be charged where there is any foundation for it in the evidence. Id.; Perez, supra at 15-17, Calderon, supra. For this purpose the evidence

should be viewed in the light most favorable to the accused. Lewis, supra at 1296; United States v. Shackelford, 677 F. 2d 422 (5th Cir. 1982). The evidence is sufficient for this purpose even if weak, insufficient, of doubtful credibility, or even partly or wholly founded in the testimony of the accused himself. Strauss, supra at 419.

With these principles in mind, the facts before the Court were amply sufficient to support Petitioner Simmons' theory of defense. The Court's attention was precisely drawn to this theory of the defense on motions before closing arguments (R. Vol. 19, pp. 916-917) and again upon exception to the charge of the Court. (R. Vol. 20, p. 1093-1094). The Court was clearly aware of the theory presented by Mr. Simmons (R. Vol. 19, pp. 916-917) and refused

upon request to give a specific charge on the theory. (R. Vol. 20, pp. 1093-1094). There is no requirement that the exact language of the written request to charge be given but where the theory of the defense is specifically drawn to the court's attention, the substance, if not the wording, of the request to charge is required to be given. Strauss, supra at 419.

The charges given by the court were pattern charges giving general statements of law. (R. Vol. 20, pp. 1081-1088; Vol. 19, pp. 938, 939, 944, 946). The charges were not tailored in any manner to bring Simmons' defense theory to the jury's attention. A charge on a defense theory must be a specific and precise statement of the defense theory and not one that merely states the principle in a general or

abstract manner. Perez, supra at 16. "[T]he instructions must be sufficiently precise and specific to enable the jury to recognize and understand the defense theory, test it against the evidence presented at trial, and then make a definitive decision whether, based on the evidence and in the light of the defense theory, the defendant is guilty or not guilty." Barham, supra at 244.

The necessity for a precise charge on Simmons' defense theory is made even more critical in this case because the court charged the jury that, "...[A]lso a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator." [Emphasis added] (R. Vol. 20, p. 1084). This charge, although a correct statement of

law, differs totally from the Simmons theory of defense which recognizes that a person with knowledge of the conspiracy may act in a way which advances it without becoming a conspirator. (Compare Taglione, supra at 197, 198, where the charge also correctly stated the law but did not correctly instruct on the theory of defense). This charge by the court coming at the end of its general pronouncement on conpsiracy not only fails to set forth the theory of defense but had the effect of subverting the theory. In this regard, the instructions of a judge "carry an authority bordering on the irrefutable". Wolfson, supra at 221. The charge left the jury with the erroneous negative implication that one so acting with knowledge of the

conspiracy must be guilty.

The lack of a specific charge on Petitioner Simmons' defense theory denies him due process of law as required by the Fifth Amendment of the United States Constitution and enfringes upon his right to a full and fair jury trial as required by the Sixth Amendment of the United States Constitution.

CONCLUSION

This court should reverse the decision of the United States Court of Appeals for the Eleventh Circuit; reverse the judgment of the U.S. District Court and remand this case to the U.S. District Court with direction to set aside the verdict.

Respectfully submitted,

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By: C. James McCallar, Jr.

By: H. Joseph Chandler, Jr.

ATTORNEYS FOR PETITIONER
NEIL SIMMONS

PROOF OF SERVICE - CERTIFICATE BY BAR MEMBER

I. C. James McCallar, Jr., attorney for Neil Simmons, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day May, 1984, I served three copies of the foregoing Petition for Writ of Certiorari on all other parties to this proceeding by depositing same in the United States mail, with sufficient, first class postage affixed thereto, and addressed to counsel for said parties as follows:

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THIS 25th day of May, 1984.

C. James McCallar, Jr.
Attorney for Petitioner

A P P E N D I X

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UNITED STATES of America,
Plaintiff-Appellee.

v.

Neil SIMMONS, Nelson Valladares,
Leroy Williams, Defendant-Appellants.

No. 82-8770

United States Court of Appeals
Eleventh Circuit

Feb. 24, 1984

TUTTLE, Senior Circuit Judge:

This appeal presents claims by the three appellants of which only those of Simmons warrant discussion. Based on the evidence, reviewed in the light most favorable to the government, accepting all reasonable inferences from the direct and circumstantial evidence adduced, the jury could have found the following facts:

Nelson Valladares of Miami, Florida had a meeting in Savannah, Georgia, to obtain the services of one David

Blackston to provide his organization for offloading marijuana in Georgia (subsequently extended to South Carolina.) The Blackston organization obtained the help of appellant Williams for a payment of $10,000 to help offload the marijuana at Frogmire, South Carolina and to drive a trailer truck load into Georgia or to a stash house in South Carolina. This offloading produced approximately 600 bales of marijuana weighing approximately 30,000 to 35,000 pounds. Williams helped throw the bales weighing between 40 and 80 pounds onto the truck which he then drove to the stash house.

Anticipating a second shipment, David Ingram, a lieutenant of Blackston's, approached Simmons near Savannah, Georgia to seek his help. Simmons operated Georgia Truck Center, a truck

repair business. Ingram told Simmons he needed a tractor-trailer to haul marijuana, and that he would pay $5,000 for Simmons's help to acquire the rig and conceal identity of the purchaser. He gave $3,000 up front to Simmons who found a suitable rig (consisting of tractor and 40-foot trailer) for $11,050, which he delivered to Ingram upon payment of that amount. Simmons told the seller he did not know the identity of the purchaser and told him to pick any name to be inserted in the bill of sale. A false name was inserted in the bill and the truck was fitted with a stolen tag furnished by Ingram. Ingram drove the rig to Frogmire where it was loaded with between 12,000 and 17,000 poundsl of marijuana and later

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1. This figure is arrived at by deducting

parked at Williams's residence in Georgia, before it was intercepted and confiscated.

As stated above, we affirm the convictions and sentences of Valladares and Williams without any need to discuss the several grounds of their appeals.

Simmons raises two grounds in his appeal that require our analysis:

1) Did the government carry its burden of proof in a case in which Simmons was charged with conspiracy to possess in excess of 1,000 pounds of marijuana with intent to distribute in violation of 21 U.S.C. §846?

2) Did a variance between the allegations as to one of the overt acts

---

from the weight of the merchandise off-loaded, 35,000 to 40,000 pounds, the estimated load on the smaller vehicle, 13,000 pounds.

alleged in the indictment and the proof with respect to that overt act constitute prejudicial error?

I. ELEMENTS OF PROOF

The question as to the sufficiency of the proof here depends upon whether the government was required to prove that Simmons knew that the marijuana conspiracy was in fact a conspiracy to possess with intent to distribute in excess of 1,000 pounds of marijuana. Appellant contends that an essential element of this offense is that he knew that the quantity of marijuana to be possessed exceeded 1,000 pounds. The government argues that analysis of the several provisions of Section 841 makes clear that it has no such burden. We concur in this view.

Initially, appellant contends that for him to be convicted of the

conspiracy, he must have the knowledge of the conspiracy and must intend to join and that he has the same criminal intent necessary for the substantive offense. He relies on Ingram v. United States, 360 U.S. 672 at p. 678, 79 S.Ct. 1314 at p. 1319, 3 L.Ed.2d 1503, 1508 (1959). There, the Supreme Court said: "Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself." 360 U.S. at 678, 79 S.Ct. at 1319. The Court of Appeals for the Fifth Circuit cited Ingram in an opinion which stated:

> We begin by the premise that to be convicted of an unlawful conspiracy a defendant must have knowledge of the conspiracy and must intent to join, or associate himself with the objectives of, the conspiracy. Moreover, "conspiracy to commit a particular substantive offense cannot exist without at least that degree of

> criminal intent necessary for the substantive offense," citing Ingram, supra.

United States v. Malatesta, 590 F.2d 1379 (1979).2

[1] We agree with the appellant that the government had the burden to prove at least the degree of criminal intent that was required for conviction of the substantive offense. We must, therefore, decide whether it is an essential part of the proof of the substantive offense to violate this section of the statute that the defendant was aware of the fact that the amount of the marijuana he was charged with possessing with intent to distribute involved in

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2. In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. at 1209.

excess of 1,000 pounds.

In this case, Simmons was indicted in Count 3 of conspiracy to violate Section 841(a)(1), (b)(6). At the close of all the evidence, Simmons's counsel moved the court for a judgment of acquittal on the conspiracy count on the ground that there was insufficient evidence on the essential element of Simmons's knowledge of an amount of marijuana in excess of 1,000 pounds. The court denied this motion, but earlier in the case the court had ordered a verdict of acquittal on Count 2, the substantive possession charge in the indictment, which Simmons was accused of conspiring to commit in Count 3. The basis of the court's ruling on this motion was that there was insufficient evidence to prove that Simmons had knowledge of an amount of marijuana in excess of 1,000 pounds.

Simmons argues that it was inconsistent for the trial court not to have dismissed the conspiracy count, once it found a failure of proof with respect to the substantive count. However, the fact that the trial court may have mistakenly dismissed the substantive count only benefitted Simmons. It should not bind this Court in our effort to determine whether the statute was correctly interpreted by the court.

Section 841 provides in material part as follows:

> (a) ... It shall be unlawful for any person knowingly or intentionally (1) to ... possess with intent to ... distribute ... a controlled substance;
>
> (b)(6) In the case of a violation of subsection (a) of this section involving a quantity of marijuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years ....

Subsection (b)(6) was added by

Congress in 1980 to amend the provisions of subsection (b)(1)(B) which had provided for a sentence in a marijuana case of not more than five years. The legislative history demonstrates the purpose of Congress to enhance the penalty that could be imposed when substantial amounts were involved. See Report by the Senate Labor & Human Resources Committee, Infant Formula Act of 1980,3 96th Cong. 2d Sess. Aug. 26, 1980, p. 14.

The statute makes it a crime for a person to possess with intent to distribute a controlled substance. It then provides that if the controlled substance is marijuana, and the crime (of possessing with intent to distribute marijuana) "involv[es] a quantity of

3. The new penalty provision in subsection (6) was a rider to the Infant Formula Act of 1980.

marijuana exceeding 1,000 pounds" punishment of a maximum of 15 years is authorized. This simply means that the crime can be proved without any consideration of the amount involved, but then if the proof shows that more than 1,000 pounds was "involv[ed]" the limit on the maximum sentence is 15 instead of five years.

[2] We conclude, therefore, that the United States need not prove knowledge or intent of the accused to possess in excess of 1,000 pounds to be subject to the more severe sentence. To be subject to it, the government need only show that the amount knowingly possessed with intent to distribute exceeded 1,000 pounds.

Since conviction of the substantive crime does not require knowledge of the amount of marijuana to be possessed,

proof of the conspiracy to commit the substantive offense does not include knowledge of the amount of marijuana to be possessed. The 1,000 pound provision is applicable only to the sentencing phase.

We conclude, therefore, that it is not necessary for us to decide whether the jury could have found that the circumstances surrounding Simmons's participation in the conspiracy established his knowledge that in excess of 1,000 pounds of marijuana was to be involv[ed]."

II. VARIANCE BETWEEN ALLEGATIONS AND PROOF OF OVERT ACT

The conspiracy indictment included allegations of the commission of 17 overt acts. Among these was overt act 11, which charged: "During the middle part of January, 1981 Neil Simmons

received approximately $3,000 from James Ingram, Sr. as payment for securing false registration for a tractor-trailer truck for use in transporting marijuana." In his appeal, Simmons complains of a variance between this allegation and the proof at the trial where Ingram testified that he gave Simmons $3,000 for "plans to bring the truck with marijuana to put on his yard to store it."

Simmons contends that this evidence amounted to an illegal amendment to the indictment. However, appellant fails to note the original testimony by Ingram as to the purpose for which he introduced Blackston to Simmons. In response to the question, "what was the purpose of you introducing him to David Blackston?", Ingram answered: "The purpose was to buy a tractor and trailer

and looking for a place to store some loaded trucks with marijuana." He further testified that Simmons was to be sure that the truck he acquired was not to be titled in Blackston's name, thus meeting the allegation in the indictment as to the use of the $3,000 "as payment for securing false registration for a tractor-trailer truck for use in transporting marijuana." Also, under cross-examination, Ingram testified that the $3,000 payment was "for whatever it took for him not to say nothing, to get the truck ready to go get the load of marijuana."

[3,4] Differing from most conspiracies, there is no requirement that a conviction of conspiracy to violate Section 846 depend on the proof of the commission of an overt act in addition to proof of the agreement to violate the

law. United States v. Badolato, 701 F.2d 915 (11th Cir. 1983); United States v. Ramos, 666 F.2d 469, 475 (11th Cir. 1982); United States v. Futch, 637 F.2d 386, 389 n. 5 (5th Cir.1981). In light of this, it is difficult to see how the appellant can claim reversible error because he contends that the government failed to prove the facts alleged as constituting one of the overt acts which were included in the indictment. Moreover, even if the testimony of Ingram taken as a whole on direct and cross-examination be considered as constituting a variance from the allegations as to overt act no. 11, it was not a variance that would cause a court to find any prejudicial error. It is only when a variance between the overt act as charged and as proved constitutes prejudicial error and when

it affects the substantial rights of the accused that he can successfully challenge it on appeal. Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); United States v. Solomon, 686 F.2d 863 (11th Cir. 1982). Here, Ingram's testimony amply proved that the $3,000 sum was given in part for the acquisition of a motor trailer as to which a false bill of sale was to be prepared and on which a stolen tag was to be placed. That, in substance, corresponded with the allegations in the indictment. See United States v. Enstam, 622 F.2d 857, 867 (5th Cir.1980), cert. denied, 450 U.S. 912, 101 S. Ct. 1351, 67 L.Ed.2d 336 (1981).

Having carefully considered the other issues raised by the parties, we conclude that the judgments and sentences must be

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-8770

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

NEIL SIMMONS,
Defendant-Appellant.

Appeal from the United States
District Court for the
Southern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 24, 1984, 11 Cir., 1984 _____F.2d_____).

(March 28, 1984)

Before JOHNSON and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is

DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc,

and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/FRANK M. JOHNSON, JR.
United States Circuit Judge

21 U.S.C.§841

OFFENSES AND PENALTIES

§841. Prohibited acts A--Penalties

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Except as otherwise provided in section 405 [21 USCS § 845], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such

person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the

absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation

after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction,

impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any

sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of the United

States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 404 [21 USCS § 844(a), (b)].

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or

dispense, except as authorized by this title, phencyclidine (as defined in section 310(c)(2) [21 USCS §830(c)(2)] shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment

under this paragarph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision

of this title, title III, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

(c) A special parole term imposed under this section or section 405 [21 USCS § 845] may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve

all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 405 [21 USCS § 845] shall be in addition to, and not in lieu of, any other parole provided for by law.

(d) Any person who knowingly or intentionally--

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this title, or

(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this title,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

(Oct. 27, 1970, P. L. 91-513, Title II, Part D, §401, 84 Stat. 1260, as amended

Nov. 10, 1978, P. L. 95-633, Title II, §§201, 92 Stat. 3774; Sept. 26, 1980, P. L. 96-359, §8(c), 94 Stat. 1194.)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA

VS.

NELSON VALLADARES
CHARLES CHRISTOPHER ABNER
LEROY WILLIAMS
CHUCK MANN
MARK BARNARD
NEIL SIMMONS

CR 482-40

REQUESTS TO CHARGE

COMES NOW Defendant, Neil Simmons, in the above-captioned case, and files this his requests to charge as enumerated and attached hereto.

This _____ day of _____, 1982.

Respectfully submitted,

/s/C. James McCallar, Jr.
C. James McCallar, Jr.

/s/Alex L. Zipperer, III
Alex L. Zipperer, III

Attorneys for Defendant, Neal Simmons

CHARGE NO. 4

I charge you that the seller or furnisher of a vehicle, in himself innocent, is not a conspirator of the buyer because he knows that the buyer means to use the vehicle to commit a crime. [United States vs. Falcone, 311 U.S. 205; 85 L.Ed 129 (1940)].

LEGISLATIVE HISTORY

INFANT FORMULA ACT OF 1980

P.L. 96-359, see page 94 Stat. 1190

House Report (Interstate and Foreign Commerce Committee) No. 96-936, May 12, 1980 [To accompany H.R. 6940]

Senate Report (Labor and Human Resources Committee) No. 96-916, Aug. 26, 1980 [To accompany S. 2409]

Cong. Record Vol. 126 (1980)

DATES OF CONSIDERATION AND PASSAGE

House May 20, September 9, 1980

Senate September 8, 1980

The House bill was passed in lieu of the Senate bill after amending its language to contain the text of the Senate bill.

The Senate report is set out.

SENATE REPORT NO. 96-916

3. Marihuana trafficking penalties

Section 8(c) of the legislation increases maximum penalties for drug trafficking violations involving over 1,000 pounds of marihuana. The subsection amends section 401 of the

Conrolled Substances Act to distinguish--for purposes of criminal sanctions--between large and small trafficking violations.

The Committee proposal provides a harsh penalty for individuals convicted of trafficking in large amounts of marihuana. Individuals convicted of trafficking in over 1,000 pounds would be subject to a maximum 15 year prison sentence and/or a maximum $125,000 fine. Individuals convicted of a second offense would be subject to a maximum 30 year prison sentence and a maximum $250,000 fine.

Current law provides that individuals convicted of trafficking in marihuana, regardless of amount, are subject to a maximum 5 year prison sentence and/or a $15,000 fine. The penalties double in the case of convictions involving a

second offense. Current law fails to distinguish between trafficking violations involving small versus large quantities of the drug.

The Committee believes the current drug penalty structure, with respect to marihuana, is inadequate to deter individuals and major criminal organizations involved in extensive trafficking operations. Law enforcement officials have testified repeatedly that the financial benefits of large scale marihuana trafficking are so lucrative that current criminal sanctions are viewed as an acceptable cost of doing business.

The Committee believes the continued, indeed widespread illegal distribution of marihuana in the United States poses potentially grave public health ramifications. The Committee believes

the widespread use of marihuana in America today is due in large measure to the activities of covert sophisticated trafficking networks. If drug law enforcement personnel are to have an impact on reducing supplies of this drug, they must have the capability to recommend imposition of prison sentences sufficient to disrupt major trafficking operations.

The Committee amendment provides for maximum prison sentences equivalent to those currently available for heroin offenses. The Committee believes marihuana trafficking is a serious problem and one for which serious criminal sanctions should be imposed.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA

v.

NELSON VALLADARES
CHARLES CHRISTOPHER ABNER
LEROY WILLIAMS
CHUCK MANN
MARK BARNARD
NEIL SIMMONS

INDICTMENT NO. CR 482-40

VIO: 21 U.S.C. §841 (a)(1)(B)(6)
Possession with Intent to
Distribute

21 U.S.C. §846
Conspiracy

18 U.S.C. §2
Aiding and Abetting

THE GRAND JURY CHARGES:

That beginning during November, 1980, and continuing up to and including February, 1981, in Chatham County, within the Southern District of Georgia, and elsewhere, the defendants herein,

NELSON VALLADARES

CHARLES CHRISTOPHER ABNER

MARK BARNARD

LEROY WILLIAMS

whose other and further names are to the Grand Jury unknown, did unlawfully, willfully and knowingly aided and abetted by each other, and by other persons, some of whose names are known to the Grand Jury, to-wit: Richard David Blackston, Larry Emory Blackston, Carroll Barrett Zeigler, John Allen Morgan, James R. Ingram, Sr., Lawrence K. Harn, Larry A. Adams, Russell Irvy Hardin, Timothy M. Shoening, James R. Ingram, Jr., Michael R. Feltovic III, William Frank Thomas and Elmer Grady Braddock, and others unknown to the Grand Jury, did possess with intent to distribute a quantity of marihuana in excess of one thousand (1,000) pounds, a

Schedule I controlled substance; done in violation of Title 21, United States Code, Section 841 (a)(1)(B)(6) and Title 18, United States Code, Section 2.

COUNT TWO

THE GRAND JURY FURTHER CHARGES:

That beginning during January, 1981, and continuing up to and including February, 1981, in Chatham County, within the Southern District of Georgia, and elsewhere, the defendants herein,

NELSON VALLADARES

CHARLES CHRISTOPHER ABNER

MARK BARNARD

CHUCK MANN

NEIL SIMMONS

whose other and further names are to the Grand Jury unknown, did unlawfully, willfully and knowingly, aided and abetted by each other and by other persons, some of whose names are known

to the Grand Jury, to-wit: William Frank Thomas, James R. Ingram, Jr., Richard David Blackston, James Murray, Carroll Barrett Zeigler, James R. Ingram, Sr., Michael R. Feltovic III, James Braxton Enzor, Clarence Outler, Clifford Washington, and Samuel Brantley, and others whose names are unknown to the Grand Jury, did possess with intent to distribute a quantity of marihuana in excess of one thousand (1,000) pounds, a Schedule I controlled substance; done in violation of Title 21, United States Code, Section 841 (a)(1)(B)(6) and Title 18, United States Code, Section 2.

COUNT THREE

THE GRAND JURY FURTHER CHARGES:

That beginning during the early part of November, 1980, and continuing thereafter up to approximately February,

1981, in Chatham County, within the Southern District of Georgia, and elsewhere, the defendants herein,

NELSON VALLADARES

CHARLES CHRISTOPHER ABNER

LEROY WILLIAMS

CHUCK MANN

MARK BARNARD

NEIL SIMMONS

whose other and further names are to the Grand Jury unknown, did unlawfully, willfully and knowingly conspire, with each other, and with other persons to the Grand Jury known and who are unindicted co-conspirators in this indictment as follows: Larry Emory Blackston, John Allen Morgan, Lawrence K. Harn, Larry A. Adams, Russell Irvy Hardin, Timothy M. Shoening, E. Grady Braddock, Richard David Blackston, Carroll Barrett Zeigler, William Frank

Thomas, James Braxton Enzor, James R. Ingram, Sr., Michael R. Feltovic III, James R. Ingram, Jr., Clarence Outler, Marion Patrick Howard, Jr., James Murray, James Bracton Enzor, Clifford Washington, and Samuel Brantley, and others as yet unknown, to commit certain offenses against the United States of America, to-wit: to possess with intent to distribute in excess of one thousand (1,000) pounds of marihuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1)(B)(6).

I. OBJECT OF THE CONSPIRACY

It was an object of the conspiracy for various of the defendants and co-conspirators to distribute and possess with intent to distribute large quantities of marihuana, a Schedule I controlled substance, the exact amount

thereof being substantially in excess of one thousand (1,000) pounds in violation of Title 21, United States Code, Section 841(a)(1).

II. MEANS OF THE CONSPIRACY

Among the means by which the defendants and co-conspirators would and did carry out tne objects of the conspiracy and insure the success of their venture to import and distribute marihuana were the following:

The conspiracy took the form of a loosely-knit business organization with members performing different functions at difference levels of responsibility.

Certain members of the conspiracy including co-conspirator Richard David Blackston supervised, managed, financed and controlled the smuggling of boatloads of marihuana into the United States, and otherwised managed the

supply, distribution, and other related activities of a marihuana distribution organization (herein referred to as "the Blackston Organization").

It was a further part of the conspiracy that in order to carry out the objectives of the Blackston Organization and insure the success of their unlawful conspiracy to distribute marihuana for profit the participants organized themselves and arranged for the use of trucks to transport the marihuana.

It was a further part of the conspiracy for the participants to conceal their unlawful activities by securing the cooperation of law enforcement officers including Georgia Highway Patrol Sergeant Russel Irvy Hardin and Department of Natural Resources, Law Enforcement Division

Sergeant Larry A. Adams, and Thunderbolt, Georgia Police Chief Marion Patrick Howard, Jr., and Port Royal, South Carolina Police Officer CHARLES C. ABNER by payment of money for their assistance in impeding the investigation by other law enforcement agencies into the conspirators' activities, and giving notice to the conspirators of the activities of law enforcement officers, so the conspirators would avoid detection and the conspiracy remain concealed. It was a further part of the conspiracy that the law enforcement officers would use their positions, including their official patrol cars, to assist in the distribution of marihuana.

It was a further part of the conspiracy to avoid detection and to coneal [sic] the identity of its members. To accomplish this objective

those conspirators involved in law enforcement work would withhold information from other investigating law enforcement agencies.

In furtherance of the conspiracy to possess with intent to distribute in excess of one thousand (1,000) pounds of marihuana and to put into effect the objects of the Blackston Organization, the defendants and conspirators did commit and caused to be committed among other acts the following Overt Acts toward the completion of the conspiracy.

OVERT ACTS

EFFINGHAM COUNTY - STAR LOAD

1. During the first part of November 1980 in Chatham County, Georgia, Alred R. "Sonny" Cannas introduced Nelson Valladares to David Blackston.

2. During the end of November or the first part of December, 1980 in Miami,

Florida Nelson Valladares paid David Blackston $50,000 to facilitate the scheme to distribute marihuana.

3. During the middle of December 1980 Charles Christopher Abner received $5,000 from David Blackston as payment for being a lookout during the unloading of marihuana from the vessel "STAR."

4. On or about December 16, 1980, Charles Christopher Abney [sic] was near the offload site in Beaufort County, South Carolina, equipped with a radio transmitter and receiver to monitor law enforcement radio calls and relay information to offloaders at the dock, during the unloading of marihuana from the vessel.

5. During the first part of December 1980 Mark Barnard drove from Savannah, Georgia to Miami, Florida with Michael Feltovic to meet Nelson Valladares.

6. During the first part of December 1980, Mark Barnard and Michael Feltovic drove back to Savannah, Chatham County, Georgia from Miami, Florida, transporting to C. B. Zeigler's house approximately 15 men to be used as offloaders.

7. During December 1980 Michael Feltovic and Leroy Williams met with David Blackston and Leroy Williams agreed to transport marihuana by truck from the offload dock to a storage site at Frogmore, Beaufort County, South Carolina for $10,000.

8. During the middle of December 1980 Leroy Williams and other co-conspirators travelled from Chatham County, Georgia to the offload site in South Carolina and unloaded marihuana from a shrimp boat.

9. On approximately January 20, 1981,

marihuana was moved by truck by Mark Barnard and others from the storage site in Frogmore, Beaufort County, South Carolina to Savannah, Chatham County, Georgia.

JEANNETTE MURRAY LOAD

10. During January 1981, co-conspirator Richard David Blackston provided $13,000 to co-conspirator James R. Ingram, Sr. for the purchase of a tractor trailer from co-conspirator Neil Simmons to be used to transport the marihuana.

11. During the middle part of January 1981, Neil Simmons received approximately $3,000 from James Ingram, Sr. as payment for procuring false registration for a tractor trailer truck for use in transporting marihuana.

12. During the middle part of January 1981, Neil Simmons sold James Ingram,

Sr. a tractor trailer truck for $13,000 for the use in transporting marihuana.

13. During the latter part of January 1981, approximately January 25, 1981, Mark Barnard assisted by others travelled from Savannah, Chatham County, Georgia, to Frogmore, Beaufort County, South Carolina, and unloaded marihuana from the vessel "JEANNETTE MURRAY."

14. During the latter part of January 1981, Chuck Mann and other co-conspirators left from Chatham County, Georgia in a small boat to meet the vessel, "JEANNETTE MURRAY" at sea and pilot it to a dock in Frogmore, Beaufort County, South Carolina so its cargo of marihuana could be unloaded.

15. During the latter part of January, approximately January 25, 1981, Charles Christopher Abner was near the offload site in Beaufort County, South

Carolina, equipped with a radio transmitter and receiver to monitor law enforcement radio calls and relay information to offloaders at the dock, during the unloading of marihuana from the vessel.

16. During the latter part of January 1981, approximately January 25, 1981, David Blackston had a truck load of marihuana brought from the storage site in Frogmore, Beaufort County, South Carolina to Savannah, Chatham County, Georgia.

17. During the latter part of January, on approximately January 26, 1981, Nelson Valladares met in Savannah, Chatham County, Georgia with David Blackston and others to discuss payment and distribution of marihuana unloaded from the vessel "JEANNETTE MURRAY."

All done in violation of Title 21,

United States Code, Section 846.

A True Bill.

/s/Vincent Shadwick
Foreperson

/s/Hinton R. Pierce
HINTON R. PIERCE
UNITED STATES ATTORNEY

/s/William H. McAbee II
William H. McAbee II
Assistant United States Attorney